H.R. 4086

Vol. 130 WASHINGTON, TUESDAY, JANUARY 31, 1984 No. 7

Congressional Record

CLARIFYING THE RELATIONSHIP BETWEEN THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Oklahoma (Mr. ENGLISH) is recognized for 60 minutes.

● Mr. ENGLISH. Mr. Speaker, today I have introduced a bill intended to clarify the relationship between the Freedom of Information Act and the Privacy Act of 1974. Recent judicial decisions and changes in regulations proposed by the Reagan administration have so confused the situation that it is now advisable to enact legislation in order to make sure that the original intent of the Congress will be followed.

The confusion over this issue is recent in origin. For many years, there has been no dispute about how the Freedom of Information and Privacy Acts mesh. An individual seeking access to his or her own record was always considered to be entitled to the maximum amount of information that is disclosable under either the Freedom of Information Act or the Privacy Act. This was the original understanding of those who drafted the Privacy Act of 1974, and the OMB Privacy Act guidelines have always reflected this position. Agencies, including the Department of Justice, have followed the same interpretation.

Consistent with its demonstrated lack of interest in the public availability of information in Government files, the Reagan administration is attempting to overturn this well-established interpretation of the law. The new "interpretation" is based on the proposition that the Privacy Act of 1974 was intended to prevent rather than foster an individual's right of access to records about himself. The Justice Department argues that the Privacy Act provides authority to withhold records that would otherwise be available to an individual under the Freedom of Information Act. This argument has been rejected by several circuit courts, although a few courts have accepted it. The Justice Department position however, is consistent only with a myopic view of the Privacy Act.

Congress enacted a code of fair information practices in the Privacy Act in order to provide safeguards against privacy abuses by Government agencies. One of the major elements of such a code of fair information practices—and one of the stated purposes of the Privacy Act—is to grant an individual the right to gain access to information pertaining to himself or herself in Federal agency files.

The Privacy Act also included other features of a code of fair information practices, such as a notice of information practices, limitations on disclosure of records to third parties, and collection and maintenance restrictions. Since not all of these features were appropriate for law enforcement, intelligence, and other sensitive Government records, the act permitted selected records systems to be exempted from some of these requirements.

The purpose of the exemptions was to adapt the code of fair information practices to the necessities of governmental recordkeeping. The exemptions were not intended to cut off rights that had already been granted in the Freedom of Information Act, and the Privacy Act did not in fact cut off those rights.

To illustrate the absurdity of the position taken by the Justice Department, consider the status of the central files of the Federal Bureau of Investigation. These files are completely exempt from first-party access under the provision of the Privacy Act exempting criminal investigatory records. However, the FBI has always accepted and processed similar requests under the Freedom of Information Act. Of course, information is exempt under FOIA if its disclosure would interfere with ongoing law enforcement proceedings, identify informats, disclose investigative techniques, or interfere with other important governmental or private interests. Notwithstanding the FOIA exemptions, most individuals have been able to see their FBI files in whole or in part.

If Privacy Act exemptions operate to exempt records from access under the FOIA as well, then why has the FBI responded to first-party requests under FOIA for all of these years? Why has the FBI sought amendments

to the FOIA designed to restrict first-party access rights? Given the complaints made by the FBI over the years about the FOIA, it is hard to believe that compliance with so many FOIA requests has been entirely voluntary.

It is equally hard to believe that Congress passed the Privacy Act with the intent of completely cutting off first-party rights of access to FBI files. In fact, those associated with the passage of the Privacy Act have consistently said that no diminution of first-party Freedom of Information Act rights was intended.

Treating the Privacy Act as authority to withhold information under the FOIA leads to another absurdity. Under the Justice Department argument, a Privacy Act exemption operates to deny access to the subject of a record under both the Privacy Act and the FOIA. However, a request from a third party made under the FOIA cannot be denied using a Privacy Act exemption. Thus, it is possible that a third party will be able to obtain more information about an individual using the FOIA than the individual will be able to obtain about himself under the Privacy Act. This possibility has become known as the "third-party anomaly."

How often will this happen? Much information about an individual can be denied to a third party under the personal privacy exemption of the FOIA. However, an individual can waive his privacy rights and permit personal information to be disclosed to another person. If the Justice Department persists in its interpretation of the Privacy Act, this is likely to become a regular occurrence.

The bill that I am introducing today is very short. It adds the following new subparagraph to the Privacy Act of 1974:

(q)(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

This language will not actually result in any change in the Privacy Act. It will simply clarify that the longstanding interpretation of the interrelationship between the Privacy Act and the Freedom of Information Act is correct. But for a few erroneous court decisions and some poor policies that the Reagan administration is attempting to implement, this bill would be completely unnecessary.

I am pleased that Representatives BROOKS, KINDNESS, ERLENBORN, and HORTON have joined with me in sponsoring this legislation.●

● Mr. KINDNESS. Mr. Speaker, I join today with Mr. ENGLISH of Oklahoma in introducing a bill to add a little clarifying language to the Privacy Act of 1974. If enacted, the bill would make it clear beyond quibbling that the Privacy Act should not be construed by any agency or court to prevent an individual from obtaining information about that same individual from Government files if the information would otherwise be made available to the individual under the Freedom of Information Act.

Put another way, the issue is whether the Privacy Act of 1974 prevents an individual from seeking records about himself through the Freedom of Information Act when those records have been exempted from disclosure under the Privacy Act. This bill provides the answer. "No."

This issue was raised and resolved during the period of initial implementation of the Privacy Act of 1975. That resolution was embodied in policy guidance issued by OMB and in implementing regulations issued by the Department of Justice: An individual requesting records about himself is entitled to the maximum access available under either of the acts.

Thus, if an individual makes a request of, say, the FBI for records about himself, any such records in a system of records exempt from disclosure under the Privacy Act would still be subject to search, review, and disclosure under FOIA to the extent that the records are not exempt from disclosure under FOIA or the Bureau chooses not to assert any applicable exemptions—of which there several.

A change in litigating position at the Department of Justice, has fostered conflict in the courts and, thus, the Supreme Court has been asked to resolve a question of legislative intent. Meanwhile, last August the Department of Justice proposed a change in its rules for handling Freedom of Information Act and Privacy Act requests which reflects that change in litigating position. Current policy and rules, which reflect what I believe to be legislative intent, have been in effect since 1975.

The position recently taken by the Justice Department means that if an individual asks for records about himself and they reside in a system of records exempt under the Privacy Act, that individual gets nothing. This is the result even when another person, asking for the same records under the Freedom of Information Act, must be given the material.

This is almost exactly the situation the Congress faced 10 years ago when court decisions interpreting the original seventh exemption to the Freedom of Information Act virtually closed all access to law enforcement files.

That was remedied by Congress in its 1974 amendments to the Freedom of Information Act.

On the same day in 1974 that the House overrode the President's veto of the FOIA amendments, the House considered and passed its version of the Privacy Act. One month later the House took final action on the Privacy Act.

The Department of Justice would now have us believe that, by passing the Privacy Act, the Congress undid the changes it made in the Freedom of Information Act, and the Department has asked the Supreme Court to aid and abet that revision of history.

The Department has complained to the Congress about the impact of the FOIA on law enforcement agencies. I am sympathetic to the concern that convicted felons use the FOIA to seek information about themselves concerning informants. Carefully tailored changes to FOIA's seventh exemption are awaiting action by the other body in S. 774. Perhaps the Department is frustrated that, while those changes are relatively noncontroversial, they lie dormant on the congressional calendar. But the Department's proposed change in policy would create unreasonable and unwarranted results, beyond their stated purpose.

Implementation of the Department's change of policy would result in the anomaly that a third party would have greater access to an individual's files than the individual himself.

As one who has worked for a number of years on regulatory reform legislation, I am highly critical of agencies using rulemaking power to effect a 180 degree shift in policy when there has been no change in their underlying legislative authority. That is what has happened here. And, I have urged the Department not to put this policy change into effect.

Since the Department is trying to force the Supreme Court to rule that, for the last 10 years, everyone's understanding of what Congress did when it enacted the Privacy Act was wrong, I think we here in the Congress should eliminate any room for question or quibble, and save the Court the trouble.●

● Mr. ERLENBORN. Mr. Speaker, I am pleased today to join Representative GLENN ENGLISH and others in introducing a bill to clarify the relationship between the Freedom of Information Act and the Privacy Act of 1974.

Mr. Speaker, I was one of the authors of the Privacy Act of 1974 and the 1974 amendments to the Freedom of Information Act. I managed both of those bills here on the house floor and was intimately involved in the negotiations that led to the compromises which facilitated passage of those measures.

Freedom of information and privacy protection may appear to be antithetical concepts when what is at stake is the disclosure of information in Government files. But, to repeat what I said on the day the House considered the Privacy Act—which, by the way, was the same day we overrode the President's veto of the 1974 Freedom of Information Act amendments:

It has been quite an effort to walk a tightrope in the one bill to provide the maximum access to information on the part of the public, and in the other bill to limit access to protect an individual's privacy.

There has been a tendency, I think, to view these often as conflicting, but I think that we have successfully walked that tightrope and have, in both of these pieces of leg-

islation, very important landmark legislation for open government, and yet the protection of individual rights.

In view of the court decisions and actions by the Justice Department which have led us to introduce this legislation today, I want to underscore the last words of that quote: With these two acts, we in the Congress were seeking to assure "open government and yet the protection of individual rights."

To put it as succinctly as I can, we in the Congress, by passing the Privacy Act, did not repeal any portion of the Freedom of Information Act which we were simultaneously amendment. We, in the Congress, by passing these two acts were enhancing the rights of our citizens to know what their Government was doing, particularly as those government actions related to individuals themselves. We certainly did not give with the one hand and take away with the other days later.

When the executive branch wrote its initial guidelines on how to implement the Privacy Act, some people seized on the different structure of the two acts to argue that an individual's sole means of access to records about himself was through the Privacy Act. Fortunately, the Office of Management and Budget had better judgment. It explained that in handling requests for information pursuant to the two acts, the net effect "should be to assure that individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than they had prior to its enactment." The Justice Department issued implementing regulations which would grant an individual access to records about himself "to which he would have been entitled under the Freedom of Information Act, but for the enactment of the Privacy Act and the exemption of the pertinent systems of records pursuant thereto." (28 C.F.R. 16.57)

From a purely legal standpoint, this was not a satisfactory resolution. But, Congress intent was being implemented—individuals would get the cumulative benefit of both acts, which was what we intended.

Nevertheless, some courts have suggested that, by passing the Privacy Act, we were reducing the individual's rights of access to records about himself. The seventh circuit in Chicago issued such an opinion in 1979 in the case of *Terkel* v. *Kelly*, 599 F.2d 214 (CA7, 1979); and, when given the opportunity the next year, the fifth circuit in the case of *Painter* v. *FBI*, 615 F.2d 689 (CA5, 1980) reversed a district court decision and followed the seventh circuit.

In fairness to the Justice Department, it did ask the fifth circuit to vacate that part of its decision which interpreted the Privacy Act as limiting an individual's rights of access under the Freedom of Information Act. But the fifth circuit declined.

The District of Columbia Circuit, when confronted with this issue in the case of *Greentree* v. *U.S. Customs Service*, 674 F.2d 74 (1982), rejected the decisions in the seventh and fifth circuits and ruled that "material unavailable under the Privacy Act is not per se unavailable under FOIA." The court's opinion contains a thorough explanation of the issue and how it reached its conclusion—the proper one in my view.

Since that time, the third circuit in Philadelphia has followed the District of Columbia Circuit in the cases of *Porter* v. *Department of Justice*, (No. 83-1833, CA3, Sep. 15, 1983) and the seventh circuit has reaffirmed its original error. The Supreme Court has been asked to resolve this conflict in the circuits.

I think we ought to resolve the conflict ourselves by enacting this legislation to remind everyone of Congress intent with regard to the relationship between these two important acts.●